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Torture and other cruel, inhuman or degrading treatment or punishment

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly the interim report submitted by the Special Rapporteur of the Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment, Theo van Boven, in accordance with Assembly resolution 58/164 of 22 December 2003.

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Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

Summary

In the present report, submitted pursuant to General Assembly resolution 58/164 and Commission on Human Rights resolution 2004/41, the Special Rapporteur refers to his main report to the Commission at its sixtieth session and its three addenda (E/CN.4/2004/56 and Add.1-3) and to the activities he has been carrying out since their submission. He also addresses issues of special concern to him, in particular overall trends and developments with respect to questions falling within his mandate.

The Special Rapporteur, as a follow-up to reports submitted to the Assembly at previous sessions on the issue of the prohibition of torture and other forms of cruel, inhuman, or degrading treatment or punishment in the context of anti-terrorism measures, first draws attention to attempts to circumvent the absolute and non-derogable nature of the prohibition. He then discusses the principle of non-refoulement, recalling the jurisprudence underlying the principle and noting the increase in practices that undermine it. Lastly, the Special Rapporteur draws attention to the most common consequences faced by victims of torture. In addition to the physical and psychological damage caused to the victims, the consequences of torture affect victims' families and the community at large. A holistic understanding of the impact of torture on its victims is thus necessary to develop adequate assistance.

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I. Introduction

1. The present report is the sixth submitted to the General Assembly by the Special Rapporteur of the Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment. It is submitted pursuant to General Assembly resolution 58/164 and Commission resolution 2004/41. It is the third report submitted by the present mandate-holder, Theo van Boven. This report covers issues of special concern to the Special Rapporteur, in particular overall trends and developments with respect to issues falling within his mandate.

2. The Special Rapporteur draws attention to his report to the Commission on Human Rights at its sixtieth session (E/CN.4/2004/56 and Add.1-3), in which he recalled a number of guarantees for individuals deprived of their liberty with a view to protecting them from the risk of torture and other forms of ill-treatment; examined the question of HIV/AIDS and torture; and provided information on the follow-up to the preliminary study of the Special Rapporteur on the situation of trade in and production of equipment which is specifically designed to inflict torture or other cruel, inhuman or degrading treatment, its origin, destination and forms (E/CN.4/2003/69). The annex to the main report contains an index of the reports submitted by the three successive mandate-holders.

3. As reflected in addendum 1 to his report to the Commission (E/CN.4/2004/56/Add.1), in the period from 15 December 2002 to 15 December 2003, the Special Rapporteur sent 154 letters to 76 Governments containing allegations of individual cases of torture or general references to the phenomenon of torture. The Special Rapporteur also sent 71 letters reminding Governments of a number of cases that had been transmitted in previous years. He sent 369 urgent appeals to 80 Governments on behalf of individuals with regard to whom concern was expressed that they might be at risk of torture or other forms of ill-treatment. In addition to the annual addendum on communications, the Special Rapporteur issued an addendum on the state of follow-up to recommendations made after country visits (E/CN.4/2004/56/Add.3).

4. At the invitation of the Government of Spain, the Special Rapporteur undertook a visit to that country from 5 to 10 October 2003 during which he met various government officials, representatives of civil society organizations and alleged torture victims and their relatives (see E/CN.4/2004/56/Add.2). The Special Rapporteur expressed his appreciation to the Government of Spain for the full cooperation extended to him during the mission. The Special Rapporteur concluded that torture or ill-treatment is not systematic in Spain, but that the system as it is practised allows torture or ill-treatment to occur, particularly with regard to persons detained incommunicado in connection with terrorist-related activities. Accordingly, he recommended a number of measures to be adopted by the Government in order to comply with its commitment to prevent and suppress acts of torture and other forms of ill-treatment.

5. Since the submission of the report to the Commission on Human Rights, during the period from 16 December 2003 to 31 July 2004, the Special Rapporteur sent 94 letters concerning allegations of torture to 42 Governments, as well as 237 urgent appeals to 58 Governments on behalf of persons who might be at risk of torture or other forms of ill-treatment.

6. With respect to fact-finding missions, the Special Rapporteur expected to undertake a two-week mission to China at the end of June 2004. However, it was postponed at the request of the Government until later in the year. The Special Rapporteur continued to actively consider invitations for fact-finding visits extended by the Governments of Bolivia, Georgia, Nepal and Paraguay. These visits have not yet materialized for reasons beyond the control of the Governments concerned. He regrets that his earlier requests to visit Algeria, Egypt, Equatorial Guinea, India, Indonesia, Israel, the Russian Federation with respect to the Republic of Chechnya, Tunisia and Turkmenistan have not yet led to results. In January 2004, a request was made jointly with the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health to visit the naval base of the United States of America at Guantanamo Bay.

7. The Special Rapporteur issued press statements concerning reports of abuse of Iraqi prisoners by Coalition Forces (3 May 2004), and the announcement of the postponement of his visit to China (16 June 2004). He also issued several press statements jointly with other special procedures mandate-holders, including on the human rights situation in Nepal (9 March and 14 July 2004) and on widespread abuses in the Darfur region of the Sudan (26 March 2004), and an appeal to the Government of the Islamic Republic of Iran to comply with human rights norms in the case of the investigation into the death of a journalist (27 July 2004).

8. On 26 February 2004, the Special Rapporteur made a presentation on the occasion of the award of the 2004 Prize of the Foundation for Geneva to the Association for the Prevention of Torture and the World Organization against Torture.

9. From 25 to 27 April 2004, the Special Rapporteur participated in a training seminar organized by the Organization for Security and Cooperation in Europe in Ohrid, the former Yugoslav Republic of Macedonia, on international and domestic obligations regarding the treatment of detainees and prisoners. In addition to the Special Rapporteur, representatives of the European Court of Human Rights, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, and local legal experts made presentations.

10. On 18 May 2004, the Special Rapporteur was honoured for his career and leadership in the field of human rights, and for his role as the Special Rapporteur on torture by the Bellevue Hospital/New York University Program for Survivors of Torture, an organization which has provided multidisciplinary treatment services to more than 1,000 survivors of torture from 70 countries.

11. From 21 to 25 June 2004, the Special Rapporteur chaired the eleventh meeting of special rapporteurs/representatives, independent experts and chairpersons of working groups of the special procedures of the Commission on Human Rights and of the advisory services programme. The report of that meeting is contained in document E/CN.4/2005/5.

12. On 26 June 2004, on the occasion of the United Nations International Day in Support of Victims of Torture, the Special Rapporteur, together with the Committee against Torture, the Board of Trustees of the United Nations Voluntary Fund for Victims of Torture and the Acting United Nations High Commissioner for Human Rights issued a joint statement.

II. The absolute and non-derogable prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment

13. Since the submission of his previous reports to the General Assembly, the Special Rapporteur has received with serious concern allegations of attempts to circumvent the absolute nature of the prohibition of torture and other forms of ill-treatment in the name of countering terrorism, particularly in relation to the interrogation and conditions of detention of prisoners. In this regard, the Special Rapporteur would like to draw attention to his previous reports (see A/57/173, paras. 2-35 and A/58/128, paras. 11-22).

14. Legal arguments of necessity and self-defence, invoking domestic law, have recently been put forward, aimed at providing a justification to exempt officials suspected of having committed or instigated acts of torture against suspected terrorists from criminal liability. While being aware of the threats posed by terrorism and recognizing the duty of States to protect their citizens and the security of the State against such threats, the Special Rapporteur would like to reiterate that the absolute nature of the prohibition of torture and other forms of ill-treatment means that no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture.

15. The condoning of torture is per se a violation of the prohibition of torture. Moreover, domestic law cannot be invoked as a justification for failure to comply with international treaty obligations and customary international law. The Special Rapporteur wishes to recall that no executive, legislative, administrative or judicial measure authorizing recourse to torture and cruel, inhuman or degrading treatment or punishment can be considered as lawful under international law and, therefore, any measure of that kind would engage the State's responsibility, whether it be an act of torture directly committed by, or at the instigation of, or with the consent or acquiescence of a public official or any other person acting in an official capacity on behalf of that State. A head of State, also in his or her capacity as commander-in-chief, should therefore not authorize his or her subordinates to use torture, or guarantee immunity to the authors and co-authors of and accomplices to torture. The argument that public officials have used torture having been advised by lawyers or experts that their actions were permissible is not acceptable either. No special circumstance may be invoked to justify a violation of the prohibition of torture for any reason, including an order from a superior officer or a public authority [1]

16. The Special Rapporteur notes with serious concern that attempts have been made to narrow the scope of the definition of torture contained in article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. For instance, torture has reportedly been defined elsewhere as physical pain that is difficult to endure, and which should be equivalent to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. Similarly, it has reportedly been argued that some harsh methods should not be considered as torture, but merely as cruel, inhuman or degrading treatment or punishment and therefore not absolutely prohibited and permissible in exceptional circumstances. In particular, it was reportedly asserted that permissible methods of interrogation could include the deprivation of essential

human needs, suffocation with a wet cloth and death threats. In this respect, the Special Rapporteur wishes to stress that the definition contained in the Convention cannot be altered by events or in accordance with the will or interest of States. The Special Rapporteur also wishes to recall that the prohibition applies equally to torture and to cruel, inhuman or degrading treatment or punishment.

17. The Special Rapporteur has recently received information on certain methods that have been condoned and used to secure information from suspected terrorists. They notably include holding detainees in painful and/or stressful positions, depriving them of sleep and light for prolonged periods, exposing them to extremes of heat, cold, noise and light, hooding, depriving them of clothing, stripping detainees naked and threatening them with dogs. The jurisprudence of both international and regional human rights mechanisms is unanimous in stating that such methods violate the prohibition of torture and ill-treatment. In 1997, the Committee against Torture concluded that "methods [including]: (1) restraining in very painful conditions, (2) hooding under special conditions, (3) sounding of loud music for prolonged periods, (4) sleep deprivation for prolonged periods, (5) threats, including death threats, (6) violent shaking, and (7) using cold air to chill ... are, in the Committee's view, breaches of article 16 and also constitute torture as defined in article 1 of the Convention. This conclusion is particularly evident where such methods of interrogation are used in combination".[2] Similarly, in the *Loayza Tamayo* case, the Inter-American Court of Human Rights ruled that, "even in the absence of physical injuries, psychological and moral suffering, accompanied by psychic disturbance during questioning, may be deemed inhuman treatment. The degrading aspect is characterized by the fear, anxiety and inferiority induced for the purpose of humiliating and degrading the victim and breaking his physical and moral resistance ... That situation is exacerbated by the vulnerability of a person who is unlawfully detained ... Any use of force that is not strictly necessary to ensure proper behaviour on the part of the detainee constitutes an assault on the dignity of the person ... in violation of Article 5 of the American Convention. The exigencies of the investigation and the undeniable difficulties encountered in the anti-terrorist struggle must not be allowed to restrict the protection of a person's right to physical integrity."

18. The Special Rapporteur wishes to remind the General Assembly that, according to the Human Rights Committee, the right of persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person, although not specified in the list of non-derogable rights, cannot be made subject to lawful derogation under article 4 of the International Covenant on Civil and Political Rights.[3]

19. According to allegations received, acts of torture and ill-treatment have been reportedly inflicted on suspected terrorists by private contractors. In this regard, the Special Rapporteur wishes to recall that, according to the Human Rights Committee, "the positive obligations on States parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violation of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights insofar as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due

diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities".[4]

20. The status and conditions of detention of persons suspected of terrorism also remain subjects of great concern, not only for the Special Rapporteur on torture, but also for the other mandate-holders of the Commission on Human Rights. In the aftermath of 11 September 2001, thousands of persons suspected of terrorism, including children, have been detained, denied the opportunity to have their legal status determined and prevented from having access to lawyers. Some of them are said to be still held in solitary confinement, which in itself may constitute a violation of the right to be free from torture.[5] In July 2004, the International Committee of the Red Cross expressed its concern that an unknown number of people continued to be detained outside any legal framework.

21. In this context, the Special Rapporteur refers to the joint statement adopted on the final day of the meeting of the special procedures of the Commission on the protection of human rights in the context of anti-terrorism measures, which included a request that the Special Rapporteur on the independence of judges and lawyers, the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, and the Special Rapporteur on torture visit persons detained on grounds of alleged terrorism or other violations in Afghanistan, Iraq and the military base at Guantanamo Bay (see E/CN.4/2005/5, annex I).

22. The Special Rapporteur wishes to reiterate that the maintenance of secret places of detention should be abolished under law and that it should be a punishable offence for any official to hold a person in a secret and/or unofficial place of detention. He also recalls Commission on Human Rights resolution 2004/41, in which the Commission reminded all States that prolonged incommunicado detention could facilitate the perpetration of torture and could in itself constitute a form of cruel, inhuman or degrading treatment or even torture, and urged all States to respect the safeguards concerning the liberty, security and dignity of the person. It should also be stressed that although the status of detainees may remain unclear, there is no uncertainty as to the international obligations, standards and protections that apply to them, the prohibition of torture being applicable to all individuals without exception and without discrimination, regardless of their legal status. The Special Rapporteur wishes to repeat his earlier recommendation that all detained persons should be given the ability to challenge the lawfulness of their detention, e.g. through habeas corpus or *amparo*, and that such procedure should function expeditiously (see E/CN.4/2004/56, para. 39).

23. The Special Rapporteur is seriously concerned about recent reports that some national authorities have deemed evidence that may have been obtained under torture admissible in judicial proceedings. It should be recalled that according to article 15 of the Convention against Torture, States Parties shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made. The Committee against Torture has stated that "the existence, in procedural legislation, of detailed provisions on the inadmissibility of unlawfully obtained confessions and other tainted evidence" is one of the essential means of preventing torture (A/54/44, para. 45).

24. The Special Rapporteur, recalling his own general recommendations, wishes also to refer to the statement issued by the Coalition of International Non-Governmental Organizations against Torture (CINAT) on 14 May 2004 and express his full support for its recommendations, in particular its call for independent, prompt and exhaustive investigations into and, where there is sufficient evidence, prosecution of each and every allegation of torture or other abuse, and for guarantees that there is no impunity for anyone found responsible, regardless of position or rank. He also shares its view that a comprehensive review of interrogation methods should be undertaken to ensure that they comply with international standards prohibiting torture and ill-treatment, and that immediate access of human rights monitors to detention facilities worldwide should be guaranteed.

III. The principle of non-refoulement

25. In his report to the General Assembly at its fifty-seventh session, which included a section on the prohibition of torture and other forms of ill-treatment in the context of anti-terrorism measures, one of the issues raised was the right to seek asylum, the principle of non-refoulement and extradition (see A/57/173, paras. 27-35). There is no doubt that all human rights issues and, in particular, those pertaining to the prohibition of torture and other forms of ill-treatment continue to be highly relevant to the struggle to prevent and combat acts and strategies of terrorism. Therefore, the Special Rapporteur reverts to these issues and wishes to pay particular attention to the principle of non-refoulement which, like other human rights principles, risks being eroded.

26. It must be recalled that the principle of non-refoulement is firmly anchored in international human rights law, notably in article 3 of the Convention against Torture, which states that "no State Party shall expel, return 'refouler', or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture". In the same vein, the Human Rights Committee considered the link between removal, expulsion or refoulement and torture in its General Comment No. 20: "States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement".

27. With respect to the principle of non-refoulement, it is the essential responsibility of States to prevent acts of torture and other forms of ill-treatment being committed, not only against persons within any territory under their own jurisdiction, as spelled out in article 2, paragraph 1, of the Convention, but also to prevent such acts by not bringing persons under the control of other States if there are substantial grounds for believing that they would be in danger of being subjected to torture. As the International Criminal Tribunal for the Former Yugoslavia cogently argued in *Furundzija*: "It is insufficient merely to intervene after the infliction of torture, when the physical or moral integrity of human beings has already been irremediably harmed. Consequently, States are bound to put in place all those measures that may pre-empt the perpetration of torture".[6]

28. The principle of non-refoulement is an inherent part of the overall absolute and imperative nature of the prohibition of torture and other forms of ill-treatment. In

this respect, the Special Rapporteur recalls the opinion of the European Court of Human Rights in the case of *Chahal v. the United Kingdom*, in which the Court stated that "the prohibition provided by article 3 [of the European Convention on Human Rights] against ill-treatment is absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion ... In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration."[7]

29. The Special Rapporteur is seriously concerned about an increase in practices that undermine this principle. One such practice is for the police authorities of one country to hand over persons to their counterparts in other countries without the intervention of a judicial authority and without any possibility for the persons concerned to contact their families or their lawyers. The Committee against Torture, while recognizing the need for close cooperation between States in the fight against crime and for effective measures to be agreed upon for that purpose, found that practice to be in violation of article 3 of the Convention, as well as of the right to due process.[8] In this regard, the Special Rapporteur wishes also to express his agreement with the views propounded by the Commissioner for Human Rights of the Council of Europe that, in cases where the risk of torture and ill-treatment is elevated, it is particularly important that proceedings leading to expulsion respect appropriate legal safeguards, at the very least a hearing before a judicial instance and the right to appeal.

30. Another practice that is increasingly undermining the principle of non-refoulement is the reliance on assurances, sought by the sending country from the receiving country, that transferred suspects will not be subjected to torture or cruel, inhuman or degrading treatment or punishment. The Special Rapporteur is not of the opinion that requesting and obtaining assurances as a precondition for the transfer of persons under terrorist or other charges should be ruled out altogether. In fact, in his report to the General Assembly at its fifty-seventh session he appealed to all States to ensure that, in all appropriate circumstances, before extraditing persons under terrorist or other charges, the receiving State has provided an unequivocal guarantee to the extraditing authorities that the persons concerned will not be subjected to torture or any other form of ill-treatment, and that a system to monitor the treatment of such persons has been put into place to ensure that they are treated with full respect for their human dignity (A/57/173, para. 35).

31. However, since the Special Rapporteur submitted his report to the General Assembly two years ago, he has come across a number of instances where there were strong indications that diplomatic assurances were not respected and that transferred persons allegedly were treated in violation of the absolute prohibition of torture and other forms of ill-treatment (see E/CN.4/2004/56/Add.1, para. 1827). The issue arises of whether the practice of resorting to assurances is not becoming a politically inspired substitute for the principle of non-refoulement which, it must not be forgotten, is absolute and non-derogable. The problematic nature of relying on diplomatic assurances was clearly pointed out by the Commissioner for Human Rights of the Council of Europe: "The weakness inherent in the practice of diplomatic assurances lies in the fact that where there is a need for such assurances, there is clearly an acknowledged risk of torture and ill-treatment. Due to the

absolute nature of the prohibition of torture or inhuman or degrading treatment, formal assurances cannot suffice where a risk nonetheless remains."[9]

32. The Special Rapporteur bears in mind that, in its resolution 1373 (2001) the Security Council decided that all States shall, inter alia, deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens. At the same time, he notes Security Council resolution 1456 (2003), which stresses that States must ensure that any measure taken to combat terrorism complies with all their obligations under international law and should adopt such measures in accordance with international law, in particular international human rights, refugee and humanitarian law. Full respect for basic standards of international human rights law and, in particular, for the absolute prohibition of torture in the application of national measures and in international cooperation is an issue that is integral to the mandate of the Special Rapporteur. It is from this perspective that he puts forward some further considerations as to factors and circumstances that should be taken into account when examining the issue of reliance on diplomatic assurances. While the Special Rapporteur does not intend to provide an exhaustive list of such factors and circumstances, his concerns about the ongoing erosion of the non-refoulement principle prompts him to spell out certain requirements in that regard.

33. It is important to keep in mind the basic international standard as set out in international human rights law, notably in the Universal Declaration of Human Rights (art. 5), the International Covenant on Civil and Political Rights (art. 7), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 3), the European Convention on Human Rights (art. 3) and the American Convention on Human Rights (art. 5). In its recent General Comment No. 31, the Human Rights Committee reaffirmed that the obligation of States Parties "to respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are *substantial grounds for believing that there is a real risk of irreparable harm*, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any other country to which the person may subsequently be removed" (para. 12, emphasis added). Similar wording also constitutes the quintessence of article 3 of the Convention against Torture and General Comment No. 1 (1996) of the Committee against Torture concerning the implementation of this article.

34. The factors and circumstances to be taken into account with respect to the non-refoulement principle may relate to the situation prevailing in the country to which a person is to be removed or may subsequently be removed (prevailing political conditions), or to the vulnerability of the person concerned to torture or other forms of ill-treatment (personal circumstances). The prevailing political conditions alone, or in combination with personal circumstances, are determining factors for the application of the non-refoulement principle.

35. Article 3, paragraph 2, of the Convention against Torture stipulates that, for the purpose of determining whether there are substantial grounds for believing that a person would be in danger of being subjected to torture, all relevant considerations *must be taken into account*, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights. This definition has a long history in United Nations human rights terminology[10] and is an indication of the type and nature of situations warranting

special examination by the Commission on Human Rights. It is clear from this wording that the existence of a consistent pattern of gross, flagrant or mass violations in a country is not necessarily the only determining factor, that it may have to be assessed together with other relevant considerations, in particular those relating to the vulnerability of the person concerned.

36. When assessing the prevailing political conditions that have to be taken into account in connection with the non-refoulement principle, it is also advisable to refer to article 20 of the Convention against Torture which provides for a special inquiry by the Committee against Torture in cases where the Committee has received information containing well-founded indications that torture has been systematically practised. In this connection, the Special Rapporteur recalls the definition of the Committee against Torture as regards the "systematic" practice of torture: "torture is practised systematically when it is apparent that torture cases reported have not occurred fortuitously in a particular place or at a particular time, but are seen to be habitual, widespread and deliberate in at least a considerable part of the territory of the country in question. Torture may in fact be of a systematic character without resulting from the direct intention of a Government. It may be the consequence of factors which the Government has difficulty in controlling, and its existence may indicate a discrepancy between the policy as determined by the central Government and its implementation by the local administration. Inadequate legislation which in practice allows room for the use of torture may also add to the systematic nature of this practice."[11]

37. The factors and circumstances contained in articles 3 and 20 of the Convention, in terms of a "consistent pattern of gross, flagrant or mass violations of human rights" and the "systematic practice of torture", cover common ground, although the former term is broader in scope and not clearly defined. Thanks to the efforts of the Committee against Torture, the latter term provides, for present purposes, more concrete guidance, encompassing torture both as a State policy and as a practice by public authorities over which a Government has no effective control. In circumstances where this definition of "systematic practice of torture" applies, the Special Rapporteur believes that the principle of non-refoulement must be strictly observed and diplomatic assurances should not be resorted to.

38. As stated above, among the factors and circumstances to be taken into account are also the personal circumstances of the person whose removal is at stake. His or her vulnerability to torture or to other forms of ill-treatment must be a determining factor. As stated in General Comment No. 1 of the Committee against Torture on the implementation of article 3 of the Convention, one such factor is whether the person has already been tortured or maltreated by, or at the instigation of, or with the consent or acquiescence of a public official in the (recent) past. Another factor is whether he or she has engaged in political or any other activity within or outside the State concerned that would make him or her particularly vulnerable to the risk of being in danger of torture were the person to be removed to the State in question.

39. The Special Rapporteur also wishes to draw attention to factors and circumstances that stem from conditions that may prevail in a country and touch at the same time upon the vulnerability of persons whose removal to such a country is at stake. Reference is made here to persons belonging to any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds, such as sexual orientation, and who for that reason are targeted by the

authorities or, with the connivance of the authorities, risk being subjected to persecution or systematic discrimination amounting to torture or other cruel, inhuman or degrading treatment or punishment.[12] These factors and circumstances also have to be taken into account in determining the non-refoulement issue.

40. In the light of the imperative and absolute nature of the non-refoulement principle, the Special Rapporteur is compelled to state that he is reticent with regard to the practice of resorting to diplomatic assurances, in particular if that practice becomes a substitute for the principle of non-refoulement. However, acknowledging that there are situations and cases where resort to diplomatic assurances should not be ruled out a priori, it is, in the Special Rapporteur's opinion essential that, as stated in his report of two years ago (A/57/173), such assurances contain an unequivocal guarantee that the person concerned will not be subjected to torture or any other form of ill-treatment, and that a system to monitor the treatment of that person has been put into place. In view of the fact that assurances may be no more than empty gestures,[13] the Special Rapporteur wishes to put forward a number of essential requirements that diplomatic assurances should fulfil in terms of protection from torture and other forms of ill-treatment in order to make them solid, meaningful and verifiable.

41. As regards guarantees for individuals deprived of their liberty, the Special Rapporteur has drawn up a list of basic safeguards contained in international human rights norms and standards and in general recommendations included in previous reports (E/CN.4/2004/56, paras. 27-49). While this list of basic safeguards must serve as a frame of reference with respect to all persons deprived of their liberty, a number of them need to be explicitly included in the assurances to be obtained from countries to which persons are handed over. Thus, assurances should as a minimum include provisions with respect to prompt access to a lawyer (ibid., para. 32), recording (preferably video-recording) of all interrogation sessions and recording the identity of all persons present (ibid., para. 34), prompt and independent medical examination, (ibid., para. 36) and forbidding incommunicado detention or detention at undisclosed places (ibid., para. 37).

42. Finally, a system of effective monitoring is to be put in place so as to ensure that assurances are trustworthy and reliable. Such monitoring should be prompt, regular and include private interviews. Independent persons or organizations should be entrusted with this task and they should report regularly to the responsible authorities of the sending and the receiving States.

IV. The impact of torture on victims

43. In the fulfilment of his mandate, the Special Rapporteur not only receives allegations of torture and other cruel, inhuman or degrading treatment or punishment, but also information on the medical, psychological, social and other consequences thereof. A description of the various effects or consequences of torture cannot possibly be exhaustive. However, on the basis of the information received over the years, including direct testimonies during fact-finding missions, the Special Rapporteur would like to draw attention to some of the most common consequences faced by torture victims, also often referred to as torture survivors in recognition of those who have lived through this traumatic experience. In that respect, it must be emphasized that one of the consequences of the use of torture

may be, in quite a number of instances, the death of the victim, be it intentional or not.

44. In the opinion of the Special Rapporteur, it is crucial to identify the many aspects of the impact of torture on its victims in order to better appraise and address their needs, in particular from a medico-psychosocial point of view, and to make recommendations that would ensure the most adequate and effective reparation. Most, if not all, torture survivors say that they will never forget what they have been through, but can only learn to live with it.[14]

45. The first Special Rapporteur on torture, Peter Kooijmans, described, in his first report to the Commission on Human Rights (E/CN.4/1986/15), how the victim's personality, which constitutes man's inherent dignity, could be destroyed through torture. As he pointed out, "[t]orture is the violation par excellence of the physical and mental integrity — in their indissoluble interdependence — of the individual being. Often a distinction is made between physical and mental torture. This distinction, however, seems to have more relevance for the means by which torture is practised than for its character. Almost invariably the effect of torture, by whatever means it may have been practised, is physical and psychological. Even when the most brutal physical means are used, the long-term effects may be mainly psychological, even when the most refined psychological means are resorted to, there is nearly always the accompanying effect of severe physical pain. A common effect is the disintegration of the personality (para. 4)." Indeed, in addition to the physical injuries, infliction of physical pain creates fear, anxiety, frustration and humiliation. According to the information received, infliction of pain is also frequently accompanied by mental pressure, such as verbal abuse, mocking, degrading treatment, threats or sham executions. Whether it is accompanied by mental pressure or not, the infliction of physical pain invariably leads to mental suffering as well. Thus, treating only the physical signs of torture cannot be sufficient.

46. Poor detention conditions, such as overcrowding, inadequate sanitation and hygiene, lack of food and medical assistance, not only may put at risk the physical integrity of detainees, but have far-reaching consequences on their mental integrity. The Special Rapporteur has observed that in some cases detainees are deliberately subjected to poor conditions while in pre-trial detention in order to break their will and to elicit confessions and information, or to be able to present them before the court as unwholesome and dangerous, which would erode any sympathy they might have received from the judge.[15] The Special Rapporteur also notes that prolonged solitary confinement in conditions of severe material deprivation and with no or little activity may have a serious impact on the psychological and moral integrity of the prisoner.[16]

47. Torture and other forms of ill-treatment may take such a wide variety of forms that the whole range of their physical sequelae can hardly be exhaustively described. However, amongst the most common sequelae are loss of hearing or sight, skin lesions, fractures, sexual dysfunction, cardiopulmonary, gastrointestinal, musculoskeletal and neurological problems, and infectious diseases.[17] It must be noted that victims are often subjected to multiple forms of torture and ill-treatment, which may result in overlapping injuries. While some of the physical sequelae of torture may be medically treated and may eventually disappear with time, others will remain a visible stigma, sometimes still painful, that victims will have to bear

for the rest of their lives. It will constantly remind them of the torture experience, which has considerable psychological effects.

48. The lack of medical treatment for torture survivors in custody may not only be considered as a prolongation of the torture,[18] it may also have far-reaching consequences in terms of their rehabilitation. Indeed, victims with serious physical injuries who are left medically unattended because of lack of will or means may see their condition worsen to the point that medicine may not be of any help once they are referred to the medical profession. A number of cases have been transmitted to the Special Rapporteur regarding pre-trial detainees who, after having been tortured upon arrest or during interrogation sessions, have been refused medical attention.

49. The most common diagnosis of psychiatric symptoms among torture survivors is said to be post-traumatic stress disorder. Torture victims may suffer from after-effects such as sleep disturbance, irritability, anxiety, impaired memory, concentration deficiencies and depression. The Special Rapporteur nevertheless would like to emphasize that each individual responds in his own way to the experience of having been tortured, depending on various factors, such as age, gender, family status, socio-economic status, cultural background, etc. Another factor is the so-called "psychological preparedness for trauma", which includes a strong belief system (political, religious or other), the ability to give meaning to the traumatic experience, predictability or controllability of traumatic stressors or prior immunization to traumatic stressors in the context of political activity.[19]

50. In addition to the physical and psychological damage, torture may also have a serious impact on the survivor's family and social life. Physical and psychological impediments caused by torture may create difficulties in resuming satisfactory relationships with the family, in particular with spouses and children. After-effects of torture, such as irritability, resentment and depression, may also impair interpersonal relationships. Feelings of fear and insecurity, as well as lack of self-confidence or confidence in the authorities that were supposed to guarantee a secure environment, may also make difficult a smooth readaptation into society. Permanent physical wounds, psychological problems and cognitive impairment may also reduce the survivor's working capacity. Social disabilities and loss of employment may lead to social and economic exclusion, which would have an impact on the whole family, especially when the torture survivor was the principal earner.[20] Some torture victims may also decide to leave their home place for fear of continued persecution, because of the social stigma or in an attempt to forget the experience. They, and often their relatives, would have thus to start a new life with all the socio-economic and other consequences this involves.

51. The torture of one individual affects the entire family and community of the victim. When the conditions in which a person is detained or the treatment to which she or he is subjected are made known to her or his relatives — sometimes intentionally, with a view to putting pressure on them or to punishing them — the impact thereof may also amount to a form of ill-treatment. The anguish is heightened when the family is not informed of the fate and whereabouts of the victim. In this respect, the Special Rapporteur would like to remind the General Assembly that the Human Rights Committee has held that the practice of disappearance may be considered a form of torture both for the victim and for the relatives.[21] Furthermore, once the victim is released from custody, the family may be faced with a different person, with physical and mental handicaps and who needs

special care. Relatives are not always prepared to assume such a responsibility or know how to address the problems. Thus, rehabilitation programmes should also include the family of the torture victim. When a person has been tortured for political activities or on suspicion of crime, the victim's family may also face social ostracism and discrimination.

52. Torture may also have an impact on the local community and, on a larger scale, on a whole society, especially when its practice is widespread or of a systematic nature. The Special Rapporteur observes that in some instances, the purpose of torture is to generate terror among the population, a common strategy in repressive regimes. He notes with concern that systematic rape has been used as a practice of torture to terrorize and humiliate selected ethnic groups. He would like to refer to the International Criminal Tribunal for Rwanda, which held in the Akayesu judgement that "[s]exual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole".[22] The phenomenon of torture is often surrounded by a rule of silence among the population, and sometimes even amongst the torture survivors themselves, which may create or reinforce a sense of loneliness and misunderstanding. The effects of torture may sometimes even be felt in the next generations.

53. Torture of women frequently includes sexual violence with a view to humiliating and degrading the victim. Besides the physical and psychological damage caused by the torture, sexual abuse has additional consequences for women, such as the risk of being infected with sexually transmitted diseases and of pregnancy, miscarriage, forced abortion or sterilization. In a large number of socio-cultural contexts, rape and sexual abuse continue to entail the stigmatization and ostracism of the victim upon her return to her community and family. The social stigma attached to rape in most societies often leads to the rejection of the victim by her male relatives. The Special Rapporteur and his predecessors, as well as the Special Rapporteur on violence against women, its causes and its consequences have examined issues related to custodial violence against women and the effects of the sexualization of torture against women in previous reports.[23]

54. The Special Rapporteur continues to receive allegations of torture or cruel, inhuman or degrading treatment or punishment against children.[24] He notes that torture and other forms of ill-treatment have a serious impact on the psyche and development of children who have been subjected to its violence. The effects of torture on children and teenagers will vary, depending on the intensity of the treatment they have been subjected to, but also on the victim's age, developmental stage and cognitive abilities. Symptoms will be similar to those observed in adults, but children may also develop behaviours that are not appropriate for their age. Torture also has a significant impact on children who have witnessed acts of torture or whose parents or other close family members have been tortured. Children of torture survivors may indeed face problems arising from the post-traumatic behavioural problems of their parents. "The perception of parents as close and important persons who protect their children against danger is changed ... Under such conditions one of the children may take on an adult role in the family, taking care of smaller siblings and protecting the mother. This can limit the child's chances of taking part in age-related activities such as playing with other children, and the child's own need for support and contact with a reassuring adult is not met. The child's development may be delayed if there has been no chance to talk with an

adult about the traumatic events."[25] The Special Rapporteur acknowledges with appreciation initiatives taken by human rights international mechanisms and non-governmental organizations to examine the question of violence against children. In particular, he would like to refer to the one-day general discussion on violence against children organized by the Committee on the Rights of the Child in September 2000 and September 2001 (see CRC/C/100, chap. V and CRC/C/111, chap. V) and the International Conference on Children, Torture and Other Forms of Violence: Facing the Facts, Forging the Future, organized in Tampere, Finland, in December 2001 by the World Organization against Torture. He also welcomes the appointment by the Secretary-General of an independent expert to lead a global study on violence against children.

55. While the Special Rapporteur realizes that torture survivors who flee their place of origin are often a small minority and that the overwhelming majority of torture victims are ordinary persons who have no means of seeking remedy or asylum, he also notes that torture survivors who flee their place of origin are exposed to the extra trauma of being forcibly uprooted. Therefore, in addition to suffering from the effects of torture, victims who become internally displaced persons, asylum-seekers and refugees are likely to experience another significant emotional effect, which is a deep feeling of loss — loss of a home, possessions, work, loved ones and other close relationships, life style, status, but also loss of self-esteem, trust or personal identity.

56. It is often difficult for the victims to speak about their traumatic experience. However, the Special Rapporteur notes that most victims feel the need to break the silence. Denouncing what happened, often publicly, is the first step to being recognized as a victim. In addition, speaking out is also said to be the first step in the healing process for the survivors, their families and their communities. Legal and socio-political initiatives that aim at condemning torture, bringing perpetrators to justice and providing reparation are essential factors in alleviating the impact of torture on its direct and indirect victims.

57. Understanding the various impacts that torture may have on its victims is necessary in order to identify the specific needs of the victims and to provide assistance that would adequately meet these needs. Assistance to torture victims requires urgent interventions to provide medical aid or attention and to denounce abusive situations with a view to preventing further torture or the deterioration of the state of health of the person concerned. But support to torture victims also requires a more long-term assistance, which must be multidimensional and interdisciplinary. It is the view of the Special Rapporteur that medical aspects, including psychological ones, must not be separated from legal and social assistance. Such assistance should also be provided to the families of torture survivors and, if need be, to their communities.

58. A combination of medical assistance, financial support, social re-adaptation, legal redress and, in some cases, public acknowledgement is, in the Special Rapporteur's opinion, crucial. Only interdisciplinary assistance that integrates these various aspects can ensure adequate, effective and prompt reparation commensurate to the gravity of the violation and the harm suffered.[26] In his previous capacity as a special rapporteur of the Subcommission on Prevention of Discrimination and Protection of Minorities, the Special Rapporteur prepared a study on the question of the right to restitution, compensation and rehabilitation for victims of gross

violations of human rights and fundamental freedoms, in which he noted: "the application of statutory limitations often deprives victims of gross violations of human rights of the reparations that are due to them. The principle should prevail that claims relating to reparations for gross violations of human rights shall not be subject to a statute of limitations. In this connection, it should be taken into account that the effects of gross violations of human rights are linked to the most serious crimes to which, according to authoritative legal opinion, statutory limitations shall not apply. Moreover, it is well established that for many victims of gross violations of human rights, the passage of time has no attenuating effect; on the contrary, there is an increase in post-traumatic stress, requiring all necessary material, medical, psychological and social assistance and support over a long period of time" (E/CN.4/Sub.2/1993/8, para. 135).

59. The Special Rapporteur wishes to associate himself with the views of the United Nations Voluntary Fund for Victims of Torture: "the first projects financed by the fund especially addressed the immediate needs of torture victims, essentially by providing them with medical and psychological assistance. A trend that aims to offer them holistic assistance has subsequently emerged. In fact, many projects are taking a multidisciplinary approach, combining... [psychological, medical, social, legal and financial assistance]. These types of assistance are interdependent and mutually reinforcing, when they are jointly offered, in terms of their impact on the victims' lives, responding to the multifaceted nature of the effects of torture on the individual. For example, obtaining reparation for violations undergone has a very important psychological effect for the victims. Conversely, testifying to obtain reparation can have a significant destabilizing effect, with the possibility of an emotional collapse requiring sustained psychological attention. Moreover, social assistance, together with specific kinds of specialized therapies, such as occupational therapy, has both a psychological and economic impact on victims by enabling them to rebuild their self-confidence while developing new skills and meeting their relatives' material needs. Financial assistance, for its part, is sometimes connected with medical assistance when it is used to purchase medicines for the treatment of victims" (A/58/284, para. 35).

60. The Special Rapporteur would like to take this opportunity to reiterate his call upon all States and all sectors of national and international society to support to the maximum extent possible the United Nations Voluntary Fund for Victims of Torture. He also calls for support and assistance to rehabilitation centres to ensure that victims of torture are provided the means for as full a rehabilitation as possible. He has recently received troubling allegations according to which the authorities have threatened to close rehabilitation centres for victims of torture. In this connection, he would like to refer to resolution 2004/41 of the Commission on Human Rights, in which the Commission stressed "that national legal systems should ensure that victims of torture or other cruel, inhuman or degrading treatment or punishment obtain redress and are awarded fair and adequate compensation and receive appropriate socio-medical rehabilitation, and in this regard encourages the development of rehabilitation centres for victims of torture".

Notes

[1] See General Comments No. 20 (1992), para. 3, and No. 29 (2001), para. 7, adopted by the Human Rights Committee. See also *Official Records of the General Assembly, Fifty-first Session, Supplement No. 44* (A/51/44) paras. 180-222.

[2] Ibid., *Fifty-second Session, Supplement No. 44* (A/52/44), para. 257.

[3] General Comment No. 29 (2001), para. 13.

[4] General Comment No. 31 (2004), para. 8.

[5] See General Comment No. 20 (1998) of the Human Rights Committee, para. 20. See also European Court of Human Rights, *Ocalan v. Turkey*, No. 46221/99, paras. 231-232, judgement of 12 March 2003.

[6] *Prosecutor v. Anto Furundzija*, No. IT-95-17/1-T, Judgement, 10 December 1998, para. 148.

[7] *Chahal v. the United Kingdom*, No. 22414/93, para. 80, judgement of 15 November 1996, *Reports* 1996-V.

[8] Communication No. 63/1997: *Josu Arkauz Arana v. France, Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 44* (A/55/44), annex VIII, sect. A.2.

[9] Report by Mr. Alvaro Gil-Robes, Commissioner for Human Rights, on his visit to Sweden (21-23 April 2004), Comm DH (2004) 13, para. 19.

[10] See, in particular, the language used in resolutions 1235 (XLII) and 1503 (XLVIII) of the Economic and Social Council.

[11] *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 44, Addendum 1* (A/48/44/Add.1), para. 39.

[12] See, for example, the Rome Statute of the International Criminal Court, article 7 (*h*).

[13] See Human Rights Watch, *"Empty Promises": Diplomatic Assurances No Safeguard Against Torture*, New York, 2004.

[14] The Special Rapporteur appreciates the information and documentation provided for the preparation of this report by Dr. Norberto Liwski, Chairman of the Comité de Defensa de la Salud, la Ética Profesional y los Derechos Humanos (Argentina) and member of the Committee on the Rights of the Child, and by the International Rehabilitation Council for Victims of Torture (IRCT).

[15] On this aspect, the Special Rapporteur would like to refer to the reports of his predecessor, Sir Nigel S. Rodley, on his visit to Brazil (E/CN.4/2001/66/Add.2, para. 28) and to the Russian Federation (E/CN.4/1995/34/Add.1, para. 71).

[16] In its General Comment No. 20, the Human Rights Committee notes that "prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7" (para. 6).

[17] For a more detailed view of the medical aspects of torture, see O.V. Rasmussen, "Medical aspects of torture. Torture types and their relation to symptoms and lesions in 200 victims, followed by a description of the medical profession in relation to torture" in *Danish Medical Bulletin*, vol. 37, supplement No. 1, January 1990.

[18] The Special Rapporteur notes that the European Court of Human Rights held that "[t]he lack of appropriate medical care may amount to treatment contrary to Article 3" (see *Keenan v. Turkey*, Application No. 27229/95, para. 111, ECHR, Reports of Judgements and Decisions, 2001-III).

[19] Basoglu and others, "Torture and mental health, a research overview", in *The Mental Health Consequences of Torture*, edited by Ellen Gerrity, Terence M. Keane and Farris Tuma, Kluwer Academic/Plenum Publishers, New York, 2001, p. 50.

[20] Ibid.

[21] *Quinteros v. Uruguay* (107/1981), *Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 40* (A/38/40), annex XXII.

[22] *The Prosecutor vs Jean-Paul Akayesu*, Case No. ICTR-96-4-T, decision of 2 September 1998, para. 731.

[23] See in particular, A/55/290, A/54/426, E/CN.4/1995/34, and E/CN.4/1998/54.

[24] The Special Rapporteur and his predecessors have examined the question of torture and cruel, inhuman or degrading treatment or punishment, including corporal punishment, against children in previous reports, in particular: A/57/173, A/55/290, A/54/426, E/CN.4/1996/35 and E/CN.4/1988/17.

[25] K. Smidt-Nielsen and L. Jacobsen, *Torture Survivors — Trauma and Rehabilitation*, IRCT, 1997, p. 126-127.

[26] With respect to the right to reparation, the Special Rapporteur would like to refer to the reports he and his predecessor submitted to the General Assembly in the past, in particular A/58/120, paragraphs 29 to 35, A/55/290, paragraphs 24 to 33, and A/54/42.., paragraphs 49-50. Also to be noted in this context are the draft basic principles and guidelines on the right to a remedy and reparation for violation for victims of [gross] violations of international human rights law and serious violations of international humanitarian law (E/CN.4/2004/57, annex, appendix I).